

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2005 Session

WYNONA ETHRIDGE (DUNCAN) DUNN v. ROBERT CURTIS DUNCAN

Appeal from the Chancery Court for Sumner County
No. 2002D-538 Tom E. Gray, Chancellor

No. M2004-02216-COA-R3-CV - Filed May 8, 2006

This appeal involves a dispute regarding a poorly drafted spousal support provision in a marital dissolution agreement. When the wife remarried shortly after the parties' divorce, the husband filed a petition under Tenn. Code Ann. § 36-5-101(a)(2)(B) (Supp. 2003) requesting the Chancery Court for Sumner County to terminate his spousal support obligation. The wife responded that her spousal support was not subject to statutory termination upon remarriage. Following a hearing, the trial court determined that the wife's remarriage terminated a portion of the husband's spousal support obligation. The wife has appealed. We have determined that the trial court's application of Tenn. Code Ann. § 36-5-101(a)(2)(B) to the marital dissolution agreement is correct.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Hugh C. Howser, Jr., Nashville, Tennessee, for the appellant, Wynona Ethridge (Duncan) Dunn.

Larry Hayes, Jr., Nashville, Tennessee, for the appellee, Robert Curtis Duncan.

OPINION

I.

Wynona Ethridge Duncan filed a complaint in the Chancery Court for Sumner County seeking a divorce from Robert Curtis Duncan. Thereafter, the parties reached agreements regarding the dissolution of their marriage, and these agreements were embodied in a marital dissolution agreement prepared by Ms. Duncan's lawyer. The agreement provided for spousal support as follows:

6. ALIMONY IN SOLIDO:

(A) The parties agree that the Husband shall pay no alimony until the marital residence . . . is sold.

(B) After the marital residence is sold, the Husband shall pay to the Wife \$1000.00 per month for 48 months.

(C) After the payment of \$1000.00 per month for 48 months, Husband shall pay to Wife the sum of \$2000.00 per month for 72 months, so long as Husband is gainfully employed and not disabled.

The final divorce decree entered on December 20, 2002 declared the parties divorced in accordance with Tenn. Code Ann. § 36-4-129 (1996) and specifically approved and incorporated the marital dissolution agreement.

Ms. Duncan married Rusty Dunn on May 6, 2003.¹ On January 7, 2004, Mr. Duncan filed a petition in the trial court pursuant to Tenn. Code Ann. § 36-5-101(a)(2)(B)(Supp. 2003)² seeking to terminate his spousal support and to obtain reimbursements for the support payments he had made following Ms. Dunn's marriage. Ms. Dunn responded by asserting that the spousal support mandated in the marital dissolution agreement was not subject to modification under Tenn. Code Ann. § 36-5-101(a)(2)(B) because it was "alimony in solido."

At a hearing conducted on June 29, 2004, Ms. Dunn asserted that the marital dissolution agreement's spousal support provision was ambiguous and that the ambiguity was the result of a mutual mistake. Accordingly, she attempted to present evidence regarding the parties' intentions and negotiations with regard to spousal support. Mr. Duncan objected to this evidence based on the parol evidence rule. The trial court determined that Ms. Dunn could not assert mutual mistake because she had not included the defense in her answer. The court also declined to permit Ms. Dunn to present evidence regarding the meaning of the marital dissolution agreement because it concluded that the spousal support provision was not ambiguous.

On June 30, 2004, the trial court filed an order concluding that the spousal support provision was not ambiguous. The trial court also concluded that paragraph 6(B) was not subject to revision under Tenn. Code Ann. § 36-5-101(a)(2)(B) because it provided for alimony in solido and was for

¹Ms. Duncan changed her surname to "Dunn" following her marriage in 2003. Accordingly, we will refer to her as "Ms. Dunn" for the remainder of this opinion.

²When Mr. Duncan filed his petition, Tenn. Code Ann. § 36-5-101(a)(2)(B) provided:

In all cases where a person is receiving alimony in futuro or alimony the amount of which is not calculable on the date the decree was entered, and that person remarries, the alimony in futuro or alimony the amount of which is not calculable on the date the decree was entered, will terminate automatically and unconditionally upon the remarriage of the recipient. The recipient shall notify the obligor of the remarriage timely upon remarriage. Failure of the recipient to timely give notice of the remarriage will allow the obligor to recover all amounts paid as alimony in futuro or alimony the amount of which is not calculable on the date the decree was entered, to the recipient after the recipient's marriage.

This section was subsequently amended and recodified at Tenn. Code Ann. § 36-5-121(f), (g) (2005). Act of May 16, 2005, ch. 287, 2005 Tenn. Pub. Acts 636.

an amount that could be calculated when the divorce decree was entered. However, the trial court also found that the spousal support in paragraph 6(C) was subject to termination under Tenn. Code Ann. § 36-5-101(a)(2)(B) because its amount could not be calculated on the date the divorce decree was entered. After the trial court denied her Tenn. R. Civ. P. 59.04 motion, Ms. Dunn perfected this appeal.

II. THE ADMISSION OF EXTRINSIC EVIDENCE REGARDING THE MEANING OF THE MARITAL DISSOLUTION AGREEMENT

Ms. Dunn insists that the trial court erred by excluding the evidence she sought to introduce to aid in the interpretation of the spousal support paragraph in the marital dissolution agreement. First, she argues that the trial court erred by concluding that extrinsic evidence was unnecessary because the spousal support provision was not ambiguous. Second, she argues that the trial court erred by declining to permit her to present the extrinsic evidence to establish that the spousal support provision is the product of a mutual mistake. We have determined that the trial court erred by excluding the extrinsic evidence Ms. Dunn sought to introduce.

A.

Marital dissolution agreements are essentially contracts. *Johnson v. Johnson*, 37 S.W.3d 892, 896 (Tenn. 2001); *Altman v. Altman*, 181 S.W.3d 676, 680 (Tenn. Ct. App. 2005). Accordingly, they should be construed and enforced like contracts. *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); *Towner v. Towner*, 858 S.W.2d 888, 890 (Tenn. 1993); *Pylant v. Spivey*, 174 S.W.3d 143, 151 (Tenn. Ct. App. 2003). The goal of construing marital dissolution agreements, like contracts in general, is to ascertain and give effect to the contracting parties' intentions. *Ahern v. Ahern*, 15 S.W.3d 73, 81 (Tenn. 2000).

The search for the contracting parties' intentions begins with the language of the marital dissolution agreement itself. *Elliott v. Elliott*, 149 S.W.3d 77, 84 (Tenn. Ct. App. 2004). Each provision of the agreement must be construed in light of the entire agreement, and the language in each provision must be given its natural and ordinary meaning. *Buettner v. Buettner*, 183 S.W.3d 354, 359 (Tenn. Ct. App. 2005); *Elliott v. Elliott*, 149 S.W.3d at 84. However, the search for the parties' intentions does not end with the language of the agreement. Subject to the constraints of the parol evidence rule, the courts may also consider extrinsic evidence regarding the circumstances surrounding the formation of a contract even in the absence of facial ambiguity. RESTATEMENT (SECOND) OF CONTRACTS § 202(1) & cmt. a (1981); 21 STEVEN W. FELDMAN, TENNESSEE PRACTICE: CONTRACT LAW AND PRACTICE §§ 8:16-8:18, at 886-893 (2006) (TENN. CONTRACT LAW & PRAC.).

When contracting parties have adopted a writing as the final expression of their agreement, judicial interpretation of the writing is directed to the meaning of the writing in light of the circumstances. RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. b. Approximately one hundred

years ago, the Tennessee Supreme Court, quoting the United States Supreme Court,³ noted that in the construction of contracts:

courts . . . look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described.

Staub v. Hampton, 117 Tenn. 706, 741-42, 101 S.W. 776, 785 (1907). The courts continue to apply this principle today to contracts in general, *Higgins v. Oil, Chem. & Atomic Workers Int'l Union Local 3-677*, 811 S.W.2d 875, 879 (Tenn. 1991); *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 334 (Tenn. 1983), and to marital dissolution agreements in particular. *Hathaway v. Hathaway*, 98 S.W.3d 675, 678 (Tenn. Ct. App. 2002).

Written contracts do not always clearly convey the intentions of the contracting parties. When a contractual provision is ambiguous,⁴ it cannot be enforced according to its plain meaning, *Johnson v. Johnson*, 37 S.W.3d at 896, and the courts must resort to the established rules of contract construction to ascertain the intent of the contracting parties. *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d at 890; *Kafozi v. Windward Cove, LLC*, 184 S.W.3d 693, 699 (Tenn. Ct. App. 2005).

B.

The trial court found that paragraph 6 of the marital dissolution agreement at issue in this case was not ambiguous. This conclusion is not entitled to a presumption of correctness on appeal because issues of contract construction involve questions of law, not questions of fact. *State ex rel. Pope v. U.S. Fire Ins. Co.*, 145 S.W.3d 529, 533 (Tenn. 2004); *Pylant v. Spivey*, 174 S.W.3d at 150; *Atkins v. Atkins*, 105 S.W.3d 591, 594 (Tenn. Ct. App. 2002). Accordingly, we will review the question regarding the ambiguity of paragraph 6 de novo.

The heading of paragraph 6 – “Alimony in Solido” – is inconsistent with the award of alimony in paragraph 6(C). Alimony in solido is an award of a definite sum of alimony that can be

³*Nash v. Towne*, 72 U.S. (5 Wall.) 689, 699, 18 L. Ed. 527, 529 (1867).

⁴Ambiguity is an objective concept in this context. 21 TENN. CONTRACT LAW & PRAC. § 8:54, at 1001. A contractual provision is ambiguous when the parties’ intentions cannot be reliably ascertained by considering the language of the provision in light of the surrounding circumstances. A provision is ambiguous, not simply when the parties interpret it differently, *Staubach Retail Servs.-Southeast, LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 526 (Tenn. 2005), but when its meaning is so uncertain that it can be reasonably understood in more than one way. *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 512 (Tenn. 2001).

calculable at the time of the award. *Burlew v. Burlew*, 40 S.W.3d 465, 471 (Tenn. 2001); *Bryan v. Leach*, 85 S.W.3d 136, 146-47 (Tenn. Ct. App. 2001) (defining alimony in solido as a fixed amount of alimony without conditions); Tenn. Code Ann. § 36-5-121(h)(1) (2005). Alimony in solido may be paid in a lump sum or in installments over a definite period. *Burlew v. Burlew*, 40 S.W.3d at 471; *Waddey v. Waddey*, 6 S.W.3d 230, 232 (Tenn. 1999). An award of alimony in solido is not modifiable once it becomes final. *Isbell v. Isbell*, 816 S.W.2d 735, 738 (Tenn. 1991), *superseded by statute*, Tenn. Code Ann. § 36-5-101(d)(2), as recognized in *Sommerville v. Sommerville*, No. 01A01-9502-CV-00070, 1995 WL 498943, at *1 (Tenn. Ct. App. Aug. 23, 1995) (No Tenn. R. App. P. 11 application filed); *Day v. Day*, 931 S.W.2d 936, 939 (Tenn. Ct. App. 1996).

The spousal support award in paragraph 6(C) is not alimony in solido because it contains contingencies that render the total amount of support indefinite. *Waddey v. Waddey*, 6 S.W.3d at 232 (noting that “[a]limony *in futuro* . . . lacks sum-certainty due to contingencies affecting the total amount of alimony to be paid”).⁵ The fact that the obligation could end if Mr. Duncan becomes “disabled” or is no longer “gainfully employed” prevents a definite calculation regarding the total amount of the award required by paragraph 6(C). Therefore, the heading of paragraph 6 and the substance of paragraph 6(C) create an ambiguity regarding the parties’ intentions with regard to the subsequent modifiability of the support award in paragraph 6(C).

No conclusion can be drawn other than that the discrepancy between the heading and the body of paragraph 6 renders the paragraph ambiguous. Therefore, the trial court erred by declining to permit Ms. Dunn to present extrinsic evidence to help ascertain the parties’ intentions with regard to paragraph 6. While evidence regarding the circumstances surrounding the formation of a contract is relevant when courts are called upon to construe a contract, the evidence is particularly helpful when the courts must resolve contractual ambiguities. *Jones v. Brooks*, 696 S.W.2d 885, 886 (Tenn. 1985); *Lazarov v. Klyce*, 195 Tenn. 27, 35, 255 S.W.2d 11, 14-15 (1953); 21 TENN. CONTRACT LAW & PRAC. § 8:52(2), at 991. Accordingly, we will consider the evidence contained in Ms. Dunn’s tender of proof.⁶

⁵Under existing law, the spousal support award in paragraph 6(C) would be characterized as “transitional alimony,” rather than “alimony in futuro.” Compare Tenn. Code Ann. § 36-5-121(f)(1) (definition of alimony in futuro) with Tenn. Code Ann. § 36-5-121(g)(1) (definition of transitional alimony). This distinction is irrelevant to the outcome of this case.

⁶In light of our conclusion that the trial court should have permitted Ms. Dunn to present evidence regarding the parties’ negotiations over paragraph 6(C), we need not address Ms. Dunn’s issues regarding the trial court’s refusal to permit her to belatedly amend her complaint to assert the affirmative defense of mutual mistake. Ms. Dunn sought this amendment solely to provide another justification for introducing extrinsic evidence regarding the parties’ negotiations. Had we addressed this issue, we would have determined the trial court did not err by denying the motion to amend because the motion came too late and because the mistake on which Ms. Dunn is relying was unilateral, not mutual.

III.
THE APPLICATION OF TENN. CODE ANN. § 36-5-101(a)(2)(B) TO PARAGRAPH 6(C)
OF THE PARTIES' MARITAL DISSOLUTION AGREEMENT

The evidence contained in Ms. Dunn's tender of proof does not support her claim that the parties intended the spousal support in paragraph 6(C) to be unmodifiable alimony in solido and, therefore, beyond the reach of Tenn. Code Ann. § 36-5-101(a)(2)(B). It shows that the parties specifically discussed whether the support obligation in paragraph 6(C) should end if Ms. Dunn remarried. Mr. Duncan proposed this contingency, but Ms. Dunn rejected it. However, while the parties did not include this particular contingency in paragraph 6(C), they agreed to include two others – the contingencies involving Mr. Duncan's disability or lack of gainful employment. While Ms. Dunn may not have fully understood the legal significance of agreeing to these two contingencies, the legal effect of including them in paragraph 6(C) is clear and unmistakable.

As a result of the inclusion of the two contingencies in paragraph 6(c), the amount of spousal support required by paragraph 6(C) was not calculable on the date of the final divorce decree incorporating the marital dissolution agreement. Because the amount of the award was not calculable, the award became subject to termination under Tenn. Code Ann. § 36-5-101(a)(2)(B) as it existed at the time. Therefore, the trial court correctly concluded that Mr. Duncan's obligation to pay spousal support under paragraph 6(C) ended when Ms. Dunn remarried.⁷

IV.

We affirm the trial court's July 7, 2004 order terminating Mr. Duncan's alimony in futuro obligations as of May 6, 2003 and remand this case to the trial court for any further proceedings consistent with this opinion. We tax the costs of this appeal to Wynona Ethridge Dunn and her surety for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., P.J., M.S.

⁷We would reach the same result if current law were applicable to this case. Transitional alimony is subject to termination if the recipient spouse is living with a third person. Tenn. Code Ann. § 36-5-121(G)(2)(C). Ms. Dunn is living with her new husband, and, therefore, present law would have permitted Mr. Duncan to stop making spousal support payment to Ms. Dunn as soon as she began living with Mr. Dunn.